Imej Warisan Sdn Bhd v Weida Environmental Technology Sdn Bhd

HIGH COURT (KOTA KINABALU) — SUIT NO KK-22–175 OF 2011
CHEW SOO HO J
20 DECEMBER 2013

Contract — Building contract — Breach — Design and build contract — Discovery of cracks due to settlement — Piling works done by employer — Contractor failing to carry out rectification works despite architect's instruction to make good tilting problem — Whether employer entitled to employ third party to carry out rectification works — Whether contractor liable for costs of rectification works — Whether fundamental breach — Whether loss naturally arising in usual course of things — Contracts Act 1950 s 74(1)

The plaintiff was the contractor for a construction project. The defendant was appointed by the plaintiff as a subcontract to design and build the sewage treatment plants ('the STPs') in the said project. Upon completion of the STPs, during the defects liability period the plaintiff discovered cracks on the walls of one of the STP which was tilting to a differential settlement of at least 400mm. When the defendant failed to carry out the rectification works on the STP in accordance with the recommendations of the consultant engineer, the plaintiff carried out the rectification at a total costs of RM602,580. The plaintiff therefore claimed the sum of RM602,580 being damages arising from the breach of contract by the defendant. The defendant denied liability to rectify the defects and claimed that they had constructed the STP according to the instructions and design of the consultant engineer and that they had duly performed the piling works using the plaintiff's piling rig to the satisfaction of the plaintiff. The defendant counterclaimed for the sum of RM122,550.32 being the subcontract fees still due and owing by the plaintiff.

Held, allowing the plaintiff's claim with costs and allowing the counterclaim in part with no order as to costs:

(1) The architect had issued instruction to the defendant to make good permanently the tilting problem of the STP and when the defendant failed or neglected to do so, the plaintiff could rely on common law principles to engage other contractor to carry out the work that was not properly performed. The failure to comply with the terms and conditions of the contract by failure or refusal to make good the defects could be construed as a breach of the contract. The plaintiff could also rely on s 74(1) of the Contracts Act 1950 to claim compensation for the loss or damage caused by the defendant, which naturally arose in the usual

course of things from the breach the parties knew when they made the contract to be likely to result from the breach of it. A breach of a fundamental term of the contract will attract compensation for the loss or damage arising out of the breach. The plaintiff's claim was within the law (see para 20).

(2) The defence had not come up with any technical report on the tilting to draw a conclusion that it was due to the plaintiff's piles or the change in design and specification that caused the said tilting. The defendant was the contracting party to this design and build contract. They must be conversant and must be satisfied with all technical nature of the work to be carried out as well as to complete the construction without defects of a substantial nature. Even if the pile was to be made available by the plaintiff, the defendant still held the responsibility and obligation to ensure that it was the correct and proper one to be used and could not follow blindly if it was inappropriate or unsuitable especially so when they were obligated under the contract to design and build and must therefore perform in conformity with their expertise. It was unacceptable to shift the blame to others when they had not shown that they had satisfied their fundamental obligation to build in the manner that the STP was well structured and safe. The defence was not meritorious and sustainable (see para 21).

(3) The defence's counterclaim was allowed in the sum of RM92,290.32 and this sum was to be set-off from the judgment sum of RM602,580 with no orders as to costs (see para 23).

[Bahasa Malaysia summary

Plaintif adalah kontraktor untuk projek pembinaan. Defendan dilantik oleh plaintif sebagai subkontraktor untuk melukis dan membina loji rawatan kumbahan ('LRK') dalam projek tersebut. Setelah selesai LRK tersebut, semasa tempoh liabiliti kecacatan plaintif mendapati rekahan di atas dinding salah satu LRK tersebut yang menyenget ke arah kedudukan berbeza sekurang-kurangnya 400mm. Apabila defendan gagal untuk menjalankan kerja-kerja pembaikan ke atas LRK mengikut cadangan-cadangan jurutera perunding, plaintif menjalankan pembaikan pada kos total sejumlah RM602,580. Plaintif oleh itu menuntut jumlah sebanyak RM602,580 sebagai ganti rugi berbangkit daripada kemungkiran kontrak oleh defendan. Defendan menafikan liabiliti untuk membaiki semula kecacatan dan mendakwa yang mereka telah membina LRK mengikut arahan-arahan dan lukisan jurutera perunding dan mereka telah menjalankan kerja-kerja cerucuk dengan sempurna dengan menggunakan pelantar cerucuk plaintif untuk kepuasan plaintif. Defendan menuntut balas untuk jumlah sebanyak RM122,550.32 sebagai fi subkontrak masih belum dibayar dan terhutang oleh plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan membenarkan sebahagian tuntutan balas tanpa perintah terhadap kos:

(1) Arkitek telah mengeluarkan arahan kepada defendan untuk membetulkan masalah condong LRK tersebut dan apabila defendan gagal atau cuai untuk berbuat sedemikian, plaintif boleh bergantung ke atas prinsip *common law* untuk mendapatkan kontraktor lain untuk menjalankan kerja yang tidak dilakukan dengan betul. Kegagalan untuk mematuhi dengan terma dan syarat kontrak dengan kegagalan atau enggan untuk membetulkan kecacatan boleh ditafsirkan sebagai kemungkiran kontrak. Plaintif juga dapat bergantung atas s 74(1) Akta Kontrak 1950 untuk menuntut pampasan bagi kerugian atau ganti rugi disebabkan oleh defendan, yang bangkit secara semula jadi dalam perjalanan biasa daripada kemungkiran yang diketahui oleh pihak-pihak apabila mereka membuat kontrak tersebut berkemungkinan mendapat keputusan sedemikian daripada kemungkiran tersebut. Kemungkiran terma asas kontrak akan membangkitkan ganti rugi daripada kemungkiran tersebut. Tuntutan plaintif adalah dalam undang-undang (lihat perenggan 20).

(2) Pembelaan tidak mengemukakan apa-apa laporan teknikal ke atas kecondongan tersebut untuk membuat keputusan bahawa ia adalah akibat daripada pertukaran lukisan plaintif dan spesifikasi yang menyebabkan kecondongan tersebut. Defendan adalah pihak berkontrak untuk kontrak lukisan dan pembinaan ini. Mereka semestinya benar-benar mengetahui dan berpuas hati dengan kesemua sifat teknikal kerja untuk dijalankan dan juga untuk menyelesaikan pembinaan tersebut tanpa kecacatan terhadap sifat substansial. Jikapun kerja-kerja mesti disediakan oleh plaintif, defendan masih memegang tanggungjawab dan kewajipan untuk memastikan yang ia adalah satu yang betul untuk digunakan dan tidak boleh mengikut secara membabi buta jika ia tidak wajar atau tidak sesuai terutamanya apabila mereka bertanggungjawab di bawah kontrak untuk melukis dan membina dan mesti dengan itu menjalankannya sesuai dengan kepakaran mereka. Adalah tidak dapat diterima untuk memindahkan tanggungjawab kepada orang lain apabila mereka tidak menunjukkan yang mereka telah mematuhi kewajipan asas untuk membina dalam cara bahawa LRK adalah dibina secara elok dan selamat. Pembelaan adalah tidak bermerit dan tidak boleh dikekalkan (lihat perenggan 21).

(3) Tuntutan balas pembelaan dibenarkan dalam jumlah RM92,290.32 dan jumlah ini adalah untuk di *set-off* daripada jumlah penghakiman sebanyak RM602,580 tanpa perintah terhadap kos (lihat perenggan 23).]

Notes

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3503–3538.

Cases referred to

Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 MLJ 663; [1996] 2 CLJ 1105, HC (refd)

Legislation referred to

Contracts Act 1950 s 74(1)
Evidence Act 1950 s 114(g)

Sri Marina Tiu (Yap Chin & Tiu) for the plaintiff.
Ronny Cham (Ronny Cham & Co) for the defendant.

Chew Soo Ho J:

INTRODUCTION

[1] The plaintiff was the contractor for the project known as 'Sekolah Menengah Teknik Beaufort Dan 150 Unit Kuarters Institusi Pendidikan' to be constructed on land held under CL 175342462 at Beaufort ('the said project'), Sabah. On 17 June 2006 the defendant had tendered for and was awarded by the plaintiff the subcontract to 'Design and Build Sewage Treatment Plants' in the aforesaid project. Under this contract, the defendant had covenanted to a design and build concept to complete the two treatment plants namely 1100 PE ('STP1') and 900 PE ('STP2') sewerage treatment plants ('STP'). Instruction to commence work was issued by the plaintiff vide letter dated 5 December 2006.

[2] Upon the alleged completion of the aforesaid two sewerage treatment plants by the defendant on 11 November 2008 and during the defects liability period ie sometime in May 2009, the plaintiff discovered cracks on the walls of the 1100 PE STP and it was further found that the STP 1100 PE tank had been tilting to a differential settlement of at least 400mm. The plaintiff contended that the defendant is wholly responsible for the design, build, monitoring, commissioning and completion of the two STP and is liable at the defendant's own costs to rectify and make good the 1100 PE STP and/or to reimburse the plaintiff's costs of such rectification work. When the defendant neglected, failed or refused to carry out the rectification works according to the recommendations and design of the consultant engineer for the main works, Perunding Shakelmey dan Rakan-Rakan Sdn Bhd (the 'PSRR'), the plaintiff had caused to be carried out such rectification at the total costs of RM602,580.

[3] The plaintiff therefore claims for the sum of RM602,580 being damages arising from the breach of the contract by the defendant and costs, inter alia.

[4] The defendant denied that they are liable to rectify the defects of the 1100 STP and averred that they had constructed the STP according to the instructions and design of the consultant engineer, the PSRR and that they had duly performed the piling work using the plaintiff's piling rig to the satisfaction of the plaintiff. The defendant further pleaded that the architect was incompetent to issue the rectification orders for rectification works under the terms of the contract. A counterclaim for the sum of RM122,550.32 being the subcontract fees allegedly still due and owing by the plaintiff to the defendant was claimed.

THE ISSUES

[5] The agreed sole issue for determination by this court is:

> Whether the Defendant is liable to pay the Plaintiff the sum of RM602,580.00 being the costs of the reconstruction of the STP (Sewerage Treatment Plant) incurred by the Plaintiff.

[6] Nevertheless, since the defendant has put up a counterclaim, it is necessary to determine whether the defendant has proved the counterclaim.

EVALUATION AND FINDINGS

[7] The agreed facts between the parties herein as shown in Bundle E show that the fact that the status of the plaintiff being the main contractor of the said project while the defendant was engaged on 17 June 2006 by the plaintiff as subcontractor for the design and build of the aforesaid two STP namely the 1100 PE and the 900 PE for the Sekolah Menengah Teknik Beaufort Sabah and the 150 units of Kuarters Insititusi Pendidikan and instruction to commence work vide letter dated 5 July 2006 issued by the plaintiff to the defendant as well as the work having been completed on 11 November 2008 are not in dispute. It is further agreed that the contract between the plaintiff and the defendant was on a design and build concept meaning that the defendant was wholly responsible for the design, building, monitoring, testing and commissioning, completion and maintenance of the said two STP. Parties have also agreed that in May 2009, cracks were discovered on the wall of STP 1100 PE and that it had tilted. There is also no dispute that the plaintiff had engaged Hygroclear Engineering Sdn Bhd as subcontractor to reconstruct the STP 1100 PE.

[8] Substantially parties have agreed on the facts of this case that the plaintiff and the defendant had entered into a subcontract work to design and build the two STP upon which the defendant had completed the work but it was discovered that one of the two STP ie the 1100 PE had cracks on its wall and it had substantially tilted.

[9] Evidence shows that sometime on 16 May 2009 and on 10 June 2009 the plaintiff had informed the defendant of the cracks on the walls of STP 1100 PE and that the STP had tilted towards the sludge holding section with a differential settlement of about 150 mm. The defendant was told to identify the cause of the settlement and the tilting and to propose technical remedial solutions.

[10] On 12 June 2009 a levelling survey was carried out by the plaintiff and it was discovered that the tilting had escalated to about 400 mm. The plaintiff had informed the defendant to take immediate action to remedy the problem.

[11] On 23 June 2009, the consultant engineer, PSRR vide a letter had indicated that the defendant's engineers should resolve the problem.

[12] However, despite repeated requests, the defendant had failed or refused to propose a technical solution although they had assured the plaintiff at a meeting held on 9 July 2009 that they would investigate the cause and submit a report with technical remedial solution by 15 July 2009. The defendant did propose to detach the structure of the sludge drying bed from the sludge-holding/setting tank but the plaintiff contended that the proposal was cosmetic in nature which would not resolve the tilting problem of the STP. The plaintiff alleged that the defendant's said proposal was to get through the defects liability period without having to incur costs to rectify the tilting of the sludge-holding/setting tank.

[13] On 16 November 2009, the plaintiff had informed the defendant vide letters that the plaintiff would appoint a third party contractor to carry out the rectification work according to the consultant engineer's, PSRR's recommendation.

[14] In February 2010 and May 2010, the plaintiff had instructed Messrs Mojigoh, a licensed surveyor to carry out a levelling survey on the 1100 PE STP and it was found that the tilting had continued. According to Ms Nelly Majain who is a licensed civil engineer (PW2), the detachment of the sludge drying bed from the sludge holding/setting tank was not a permanent solution to the tilting problem unless there was no tilting but from the survey report in

February and May 2010, it showed that the settlement had increased tremendously up to 700 mm. Thus, the permanent solution, she opined, was to reconstruct the STP.

[15] On 7 July 2010, the project architect then issued a letter to the defendant informing the latter that the said STP 1100 continued to tilt and the technical proposal was no longer suitable wherein the defendant was instructed to carry out rectification works acceptable by PSRR and the plaintiff; the defendant was also instructed to contact PSRR for their recommendation or to appoint their own licensed civil and structural engineer for a permanent solution to the problem. It appears that the defendant did not respond to the architect's direction nor take any action to rectify the defects. This led the plaintiff to appoint Hydroclear Engineering Sdn Bhd to carry out the work at the costs of RM602,580. In denying the plaintiff's claim, on the facts, the defendant pleaded that they are not liable to the plaintiff's claim contending that the plaintiff's claim is based on its pleaded case vide paras 4(c) and 4(d) in the statement of claim which provide:

> 4(c) The Defendant shall make good any defects, shrinkages or other faults which appears within the Defects Liability Period, being 24 months from the date of issuance of the Certificate of Practical Completion; and
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> 4(d) The Defendant will forthwith comply with all instructions issued by the Architect or the Defendant, failing which the Plaintiff shall be entitled to employ and pay other persons to execute any work which may be necessary to give effect to the instructions.

which bear reference to cl 15.0 of the contract between the plaintiff and the defendant which fundamentally enlisted, inter alia, that it is the opinion of the architect as to the practical completion of the works for which the architect shall forthwith issue a certificate of practical completion, that the architect shall specify within the defects liability period a schedule of defects and delivered to the defendant not later than 14 days after the expiration of the defects liability period and the defendant shall make good such defects, shrinkages and other faults therein specified in the architect's schedule, that the architect may issue instructions requiring any defects etc which appear within the defects liability period to be made good and if the defects etc had been made good, the architect shall so issue a certificate of making good defects and completion of making good defects shall be deemed to have taken place on the day named in the certificate. The defendant contended that since the architect was not called to testify, it must be presumed that the defendant had performed and completed all the necessary works specified. Since the architect did not testify, the defendant contended that the plaintiff had failed to prove requirement under cl 15.3 of the contract which relates to para 4(c) of the statement of claim that the architect must 'whenever he considers it necessary issue instructions requiring

any defects, shrinkage or other faults which appear within the Defects Liability Period and which are due to materials or workmanship not in accordance with this Contract to be made good'.

[16] On this point, the plaintiff submitted that the defendant had failed to plead in their defence that the plaintiff is not entitled to the claim because there was no instruction from the architect to carry out rectification works under cl 15.3 of the said contract nor that the rectification work was done by reconstruction of the 1100 STP. What had been pleaded by the defence is that the architect was and is at all material times incompetent to issue rectification orders for rectification works. (Para 19 of statement of defence).

[17] From the facts, there is apparently no dispute that the said architect had issued instructions vide his letter dated 7 July 2010 to the defendant specifying that the severity of the tilting has rendered the earlier proposal by Messrs Perunding dan Rakan-Rakan Sdn Bhd no longer suitable and that the defendant was to carry out rectification work in a manner acceptable to PSRR and the plaintiff. The defendant had also failed to heed the architect's instructions to contact PSRR for their recommendations or to engage independent engineers to propose a permanent technical solution. With the contemporaneous documents before the court, I find that the architect had in fact issued instructions to the defendant to make good the defects of tilting of the 1100 STP which is the rectification work by either proposing a permanent solution through independent engineers or in a manner acceptable to the consultant engineer/PSRR or the plaintiff. However, the defendant had not done so. When the defect in the instant case is known to the defendant during the defects liability period and with the instruction in writing from the architect requiring the defendant to resolve the said defect problem with a permanent solution, I find that the architect had duly conformed with cl 15.3 of the contract when he had issued the said instructions. I do not agree with the contention put forward by the defendant that the mere fact that the architect did not say in his letter of instruction dated 7 July 2010 (pp 278–281) that the instruction was issued pursuant to cl 15.3 but cl 2.1 would disentitle the plaintiff to claim for reasons that the effect is the same and that when this instruction was issued, it was within the defects liability period. Thus, even if the architect was not called as a witness by the plaintiff, I find no valid reason to draw any adverse inference or presumption against the plaintiff bearing in mind that the provision of s 114(g) of the Evidence Act 1950 is applicable for willful suppression of material witness or evidence but not merely because of non-calling of a witness or his evidence; see *Sarkar on Evidence* (15th Ed) Vol 2 p 1678.

[18] The defendant had further contended that cl 15.3 and cl 2.1 and 2.2 of the contract between the parties do not provide that the plaintiff could employ

and pay other persons to execute any work which may be necessary to give effect to the instructions of the architect. The plaintiff submitted that irrespective whether the architect had given instructions to rectify the defects or otherwise, the plaintiff should not be deprived of its right to claim for breach of contract under common law citing *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663; [1996] 2 CLJ 1105, 1112 FC, inter alia.

[19] In *Teh Khem On & Anor*, His Lordship Peh Swee Chin FCJ said at p 671 (MLJ); 1112 (CLJ):

> I share the view espoused by Lord Denning in *Hancock & Ors v BW Brazier Ltd* [1966] 2 ALL ER 901; [1966] 1 WLR 1317, to the effect that such clause similar to cl 23 in our instant appeal about making good structural defects discovered within six months, would not take away the right to sue in respect of such defects which were not discoverable within such six months, the provision of an express remedy of making good the same defects will not ipso facto take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl 23 provides for 12 months instead of six months. The same principles would apply.
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> Thus, the said line of defence also fails.

[20] The plaintiff had indeed pleaded in the statement of claim vide para 4(d) that 'the Defendant will forthwith comply with all instructions issued by the Architect to the Defendant, failing which the Plaintiff shall be entitled to employ and pay other persons to execute any work which may be necessary to give effect to the instructions'. It is a fact that the architect had issued instruction to the defendant to make good permanently the tilting problem of the STP and when the defendant had failed or neglected to do so, the plaintiff could rely on common law principles to engage other contractor to carry out the work that was not properly performed for reason that the failure to comply with the terms and conditions of the contract by failure or refusal to make good the defects in the performance of the contract which is fundamental can be construed as a breach of the contract. The plaintiff could also rely on s 74(1) of the Contracts Act 1950 ('Act 136') to claim for compensation for the loss or damage caused by the defendant, which naturally arose in the usual course of things from the breach the parties knew when they made the contract to be likely to result from the breach of it. Since the plaintiff had so pleaded that they shall be entitled to employ and pay other person to execute any work and pay for it to give effect to the architect's instructions to make good the defects, I find that this arises as a consequence of the breach by the defendant in not complying with the covenant in the contract which justified the plaintiff's claim. I do not find the defendant's contention tenable that the plaintiff's claim must only be confined to a particular clause of the contract. A breach of a fundamental term of the contract will attract compensation for the loss or

damage arising out of the breach. I find the plaintiff's claim is within the law. A

[21] On the defendant's defence that they are not liable because they had constructed the STP according to the instructions of PSRR and the plaintiff's consultant who gave instructions to use the plaintiff's piling rig and the plaintiff was to make available 150 mm diameter piles for the purpose of carrying out and the defendant did carry out the re-pile to the satisfaction of the plaintiff's consultant and that the tilting could be due to the change in design and specification, inter alia, I find that there is no clear evidence from the defence to rebut the allegation of defects in the tilting. Defence had not come up with any technical report on the tilting to draw a conclusion that it was due to the plaintiff's piles or the change in design and specification that caused the said tilting. It must be borne in mind that the defendant is the contracting party to this design and build contract. They must be conversant and must be satisfied with all technical nature of the work to be carried out as well as to complete the construction without defects of a substantial nature. Even if the pile was to be made available by the plaintiff, the defendant still held the responsibility and obligation to ensure that it was the correct and proper one to be used and could not follow blindly if it was inappropriate or unsuitable especially so when they are obligated under the contract to design and build and must therefore perform in conformity with their expertise. It will be unacceptable to shift the blame to others when they had not shown that they had satisfied their fundamental obligation to build in the manner that the STP is well structured and safe. I do not find this line of defence to be meritorious and sustainable. B C D E F

[22] For the foregoing reasons, I hold that the plaintiff has proved its claim on a balance of probability and that the defence has failed to rebut the plaintiff's claim on a balance of probability. I therefore allow the plaintiff's claim and enter judgment for the plaintiff in the sum of RM602,580 with interest at the rate of 5%pa from the date of judgment to date of realisation and agreed costs of RM40,000. G

[23] In respect of the defence's counterclaim, I allowed it in the sum of RM92,290.32 as shown in the balance of the account as per the plaintiff's ledger as at 31 March 2009 (Bundle B p 308) which included the RM36,000 of retention sum being the sum that the plaintiff had not disputed to be still due to the defendant and i order that this sum shall be set off from the judgment sum of RM602,580 with no orders as to costs. H I

Plaintiff's claim allowed with costs and counterclaim allowed in part with no order as to costs.

Reported by Kanesh Sundrum